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No. 79-

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

SAFEWAY STORES, INC., *et al.*,
Petitioners and Cross-Respondents,

v.

RICHARD S. LOWE, *et al.*,
Respondents and Cross-Petitioners.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 23, 1980

QUESTIONS PRESENTED[1]

1. Whether the rule of *Illinois Brick Co.* v. *Illinois*,[2] applies equally to primary producers, such as cross-petitioners here, and to ultimate consumers, such as the plaintiffs in *Illinois Brick*?

2. Whether the rule of *Illinois Brick* should be applied where the effect of the rule is to create a hiatus in the enforcement of the antitrust laws for lack of a plaintiff who can demonstrate *both* standing to sue under § 4 of the Clayton Act *and* cognizable injury under the rule of *Illinois Brick*?

3. Whether the longstanding rule of the law of conspiracy that one who is a victim of a conspiracy may sue any co-conspirator is compatible with the rule of *Illinois Brick*, at least where the plaintiff has dealt directly with at least one co-conspirator?

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[1] Pursuant to Rule 21(1)(b) of the Rules of this Court, a list of all parties to the proceeding sought to be reviewed is made a part of this petition. See Appendix A, p. 1a, *infra*.

[2] 431 U.S. 720 (1977) ("*Illinois Brick*"). The rule of *Illinois Brick* (which is actually a restatement of the holding of *Hanover Shoe Co.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968) ("*Hanover Shoe*") is that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, generally is the only party "injured in his business or property" within the meaning of § 4 of the Clayton Act. 431 U.S. at 729.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
1. There Is Apparent Conflict Between The Rule Of *Illinois Brick* And Other Decisions Of This Court Which Has Generated Confusion Over The Proper Scope And Meaning Of The Rule	7
2. Application Of The Rule Of *Illinois Brick* In Situations In Which Dismissal Of An Indirect Purchaser Plaintiff Will Create A Hiatus In Antitrust Enforcement Threatens The Vitality Of Private Antitrust Enforcement	10
3. The Decision Below Concerning Application Of The Rule Of *Illinois Brick* In The Context Of A Vertical Conspiracy Conflicts With A Decision Of The Seventh Circuit And Decisions Of Several District Courts	14
CONCLUSION	18
APPENDIX	1a

CITATIONS

	Page
CASES:	
Adams v. *Interco, Inc.*, 1980-2 Trade Cas. (CCH) ¶63, 292 (S.D.N.Y. 1980)	16
In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D.Cal 1979)	9
American Motor Inns, Inc. v. *Holiday Inns, Inc.*, 521 F.2d 1230 (3d. Cir. 1975)	15
In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. (1979	*passim*
Blonder Tongue Labs. v. *University Foundation*, 402 U.S. 313 (1971)	14
Calhoon v. *Harvey*, 379 U.S. 134 (1964)	9,17
Columbia Nitrogen Corp. v. *Roster Co.*, 451 F.2d 3 (4th Cir. 1971)	12
Commissioner v. *Estate of Donnell*, 417 F.2d 116 (5th Cir. 1969)	14
Continental TV Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977)	6,13,14
Dart Drug Corp. v. *Corning Glass Works, Inc.*, 480 F. Supp. 1091 (D.Md. 1979)	9,13,16
Engine Specialties, Inc. v. *Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979)	9
Florida Power Corp. v. *Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978)	13
Fontana Aviation, Inc. v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1978)	17
Gas-A-Tron of Arizona, Inc. v. *American Oil Co.*, 1977-2 Trade Cas. (CCH) ¶61, 789 (D.Ariz. 1977)	16

	Page
General Beverage Sales Co., Oshkosh v. *Eastside Winery*, 396 F. Supp. 590 (E.D. Wis. 1975)	12
Hanover Shoe Co. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968)	8,13,15
Hawaii v. *Standard Oil Co. of California*, 405 U.S. 251 (1972)	11
Hennessey v. *National Collegiate Athletic Assn.*, 564 F. 2d 1136 (5th Cir. 1977)	15
Illinois Brick Co. v. *Illinois*, 431 U.S 720 (1977)	*passim*
International Association of Machinists v. *Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D.Cal. 1979)	16
McLain v. *Real Estate Board of New Orleans, Inc.*, ——— U.S. ———, 100 S.Ct. 502 (1980)	14
Mandeville Island Farms, Inc., v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948)	7
Massachusetts Trustees v. *U.S.*, 377 U.S. 235 (1964).	17
Midwest Paper Products Co. v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979)	15
Nationwide Mutual Ins. Co. v. *Automotive Service Councils of Del., Inc.*, No. 78-323 (D. Del. May 20, 1980)	13
Perma-Life Mufflers, Inc. v. *International Parts Corp.*, 392 U.S. 134 (1967)	7,10 12,14
Premier Electric Construction Co. v. *Miller Davis Co.*, 422 F.2d 1132 (7th Cir. 1970)	12
Radovich v. *National Football League*, 352 U.S. 445 (1957)	7
Reading Industries Inc. v. *Kennecott Copper Corp.*, 477 F. Supp. 1150 (S.D.N.Y. 1979)	9

Page

Reiter v. *Sonotone Corp.*, 486 F. Supp. 115 (D.Minn 1980) 17

Royal Printing Co. v. *Kimberly-Clark Corp.*, _____ F.2d _____ 1980-2 Trade Cas. (CCH) ¶ 63,310 (9th Cir. 1980) 13,15

Solomon v. *Houston Corrugated Box Co.*, 526 F.2d 389 (5th Cir. 1976) 15

Solomon v. *United States*, 276 F.2d 669 (6th Cir. 1960) 15

In re Sugar Industry Antitrust Litigation, 579 F.2d 13 (3d Cir. 1978) 13,17

Tondas v. *Amateur Hockey Assn. of U.S.* 438 F. Supp. 310 (W.D.N.Y. 1977) 15

United States v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967) 6

United States v. *General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941) 15

Vermont v. *Densmore Brick Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,347 (D.Vt. 1980) 17

Washington v. *American Pipe & Construction Co.*, 280 F. Supp. 802 (S.D.Cal. 1968) 15

Westvaco Corp. v. *Adams*, 590 F.2d 1011 (5th Cir. 1979) 15

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 14

Zenith Radio Corp. v. *Matsushita Electric Industrial Co.*, No. 74-2451 (E.D.Pa., May 5, 1980) 17

STATUTES AND RULES:

Clayton Act § 4, 15 U.S.C. § 15 2,4,11

28 U.S.C. § 1254 (1) 2

Rule 15, Fed. R. Civ. P. 14

Page

LEGISLATIVE MATERIALS:

S.300, 96th Cong. 1st Sess. (1979) 7

S.1874, 95th Cong., 2d Sess. (1978) 7

H.R. 11942, 95th Cong., 2d Sess. (1978) 7

S. Rept. No. 95-934, 95th Cong., 2d Sess. (1978) 9

MISCELLANEOUS:

Berger & Bernstein, "An Analytical Framework for Antitrust Standing", 86 Yale L.J. 809 (1977) 6

Blecher and Woodhead, "The Small Prospects For Shrinking The Big Antitrust Case By Procedural Reform", Loyola U.L. Rev. 513-35 (1978) 6

Note, "Scaling The Illinois Brick Wall: The Future Of Indirect Purchasers in Antitrust Litigation", 63 Cornell L. Rev. 309 (1978) 6

Richman, "Setbacks To Private Antitrust Enforcement—A Review Of The Supreme Court's 1976-77 Term", 21 Howard L.J. 727 (1978) 6

Watson, "Bad Economics in The Antitrust Courtroom: *Illinois Brick* and The Pass-On Problem", 9 Antitrust L. & Econ. Rev. 69 (1977) 6

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CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cross-petitioners respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the court of appeals is reported at 600 F.2d 1148 (5th Cir. 1979), and is reproduced in Appendix A to the original petition (filed by Safeway Stores, *et al.*, defendants below). The judgment of the District Court for the Northern District of Texas was entered without opinion.

Jurisdiction

The judgment of the court of appeals was entered on August 17, 1979. It is reproduced in Appendix B to the original petition. The petition for rehearing was denied on April 24, 1980. The order denying rehearing is reproduced in Appendix C to the original petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes Involved

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . .and shall recover threefold the damages by him sustained. . ."

STATEMENT OF THE CASE

The cattlefeeders who are plaintiffs in the *Lowe* case[3] and Cross-petitioners here are family farmers engaged in the business of buying and feeding cattle and selling them for slaughter. The sale of fat cattle is their principal means of livelihood.

Named defendants in *Lowe* are three large supermarket chains which, according to the allegations of the complaint, have established a system of price leadership which enables them to eliminate competition among packing houses for the cattlemen's business; to eliminate competition among the chains; and, ultimately, to ensure uniform, arbitrary, non-competitive and artificially low prices for the fat cattle produced by cattlefeeders such as the *Lowe* plaintiffs. The *Lowe* complaint alleges that the three defendant chains have not acted alone, but in cooperation with other supermarket chains and other companies and individuals, both within the food retailing industry and outside it.

In June 1977, following this Court's decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977) ("*Illinois Brick*"), the defendants in the consolidated cases moved for judgment on the pleadings, arguing that since the cattlefeeders did not claim to have dealt directly with the supermarket chains their claim was barred by the *Illinois Brick* decision. Without opinion, the district court dismissed the complaints for failure to state a claim upon which relief could be granted and denied leave to amend.

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[3] This case is part of the Beef Industry Antitrust Litigation, MDL No. 248, No. 78-1817 (Consolidated), 5th Cir. The case was filed in the Northern District of Iowa on July 29, 1976. Consolidation was by order of the Judicial Panel on Multi-District Litigation (September 15, 1976). References to the "*Lowe* plaintiffs" are to plaintiffs in this case (No. 78-1820, 5th Cir.).

In the court of appeals, the *Lowe* plaintiffs requested reversal of the district court's order in three respects relevant here. First, the *Lowe* plaintiffs argued that *Illinois Brick* applies to ultimate consumers purchasing goods at the retail level, and should not be extended to bar suit by primary producers whose livelihood depends on the maintenance of competitive conditions in the market into which they must sell. The court of appeals found no reason to treat sellers differently from purchasers, and no reason to treat primary producers differently from ultimate consumers. Therefore, it ruled that primary producers, like ultimate consumers, may recover damages only from defendants with whom they have dealt directly. 600 F.2d at 1159. Second, the *Lowe* plaintiffs argued that since the allegations of their complaint established that the packers not only lacked incentive to sue but actually lacked the "injury" essential to standing under § 4 of the Clayton Act, dismissal of the complaints would allow anti-competitive conditions to flourish in the beef industry for lack of a plaintiff to challenge them. The court of appeals did not address this argument. Third, the *Lowe* plaintiffs argued that in cases where a vertical conspiracy is alleged, *Illinois Brick* does not preclude suit against *any* co-conspirator. The court of appeals rejected this contention, holding that the risk of multiple liability which the Court warned against in *Illinois Brick* precludes suit against a co-conspirator with whom the plaintiff has not dealt directly unless intermediary co-conspirators are also made named defendants. 600 F.2d at 1163.

REASONS FOR GRANTING THE PETITION

The purpose of the rule of *Illinois Brick* is to prevent, through early dismissal, the dissipation of judicial resources on cases which threaten to be unmanageably complex, which show little promise of vindicating the public policy favoring vigorous private enforcement of the antitrust laws, and which pose a risk

of the unfairness of multiple liability. To carry out this purpose, the rule sets up a series of presumptions. These presumptions are that in a price-fixing case,

> (a) the person dealing directly with the price-fixer ("the direct purchaser") has suffered the greatest injury;
>
> (b) recovery by the direct purchaser alone will encourage effective antitrust enforcement and will impose the least burden on the courts; and,
>
> (c) the possibility of multiple liability will be reduced if only the direct purchaser is allowed to recover damages for the price-fixing offense.

These presumptions are not vindicated in the Beef Industry Antitrust Litigation. The "direct purchasers" [4] have not suffered the greatest injury; in fact, they have not been injured at all.[5] Recovery by the direct purchasers, therefore, is impossible, and effective enforcement of the antitrust laws will not be enhanced by giving to them alone the right to sue. The possibility of multiple recovery is negligible or non-existent.[6]

The rule of *Illinois Brick* has been applied in this case to deny the plaintiff cattlefeeders the right to bring suit unless they can show that they fit within the narrow contours of the cost-plus exception; and this application of the rule is made even though the premises which underlie the rule are not justified here. This use of the rule of *Illinois Brick* is indicative of a larger problem: whether the rule in its present form is ripe for review.

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[4] I.e., the packers and slaughterers who are intermediaries between the cattlefeeders and the supermarket chains.

[5] See 10-14, *infra*.

[6] See n. 18, *infra*.

The use of presumptions to simplify extraordinarily complex areas of proof is not unprecedented in the antitrust area.[7] Such rules, however, are not immutable, and this Court has pointed out the symptoms which suggest that change may be desirable. Review is indicated if it appears that the rule, rather than performing efficiently, is introducing an "unintended and undesirable regidity into the law," that it is the subject of "continuing controversy and confusion, both in the scholarly journals and in the federal courts," that "the great weight of scholarly opinion has been critical of the decision," and that the courts which must apply the rule often seek to limit its reach. See *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 47-48, 50 n. 16 (1977).

The rule of *Illinois Brick* exhibits these symptoms. It compels the dismissal of many antitrust cases regardless of the fact that dismissal often does not advance the purposes of the rule. The "great weight of scholarly opinion" has been critical of the rule.[8] "Continuing controversy and confusion" is evident not only in the scholarly journals but also in the decisions of the lower courts which have attempted to apply it: lower court interpretations of the scope and meaning of the rule differ

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[7] See, e.g., *United States* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967). An unusual feature of the *Illinois Brick* presumptions, however, is that in many cases, and indeed in the present case, they operate in favor of the antitrust defendant, departing sharply from the generally pro-enforcement slant of the antitrust laws.

[8] *See, e.g.*, Blecher and Woodhead, "The Small Prospects For Shrinking The Big Antitrust Case By Procedural Reform," 11 Loyola U.L.Rev. 513 (1978); Richman, "Setbacks To Private Antitrust Enforcement—A Review Of The Supreme Court's 1976-1977 Term," 21 Howard L. J. 727 (1978); Note, "Scaling The Illinois Brick Wall: The Future Of Indirect Purchasers In Antitrust Litigation," 63 Cornell L. Rev. 309 (1978); Berger & Bernstein, "An Analytical Framework For Antitrust Standing," 86 Yale L. J. 809 (1977); Watson, "Bad Economics In The Antitrust Courtroom: *Illinois Brick* And The Pass-On Problem," 9 Antitrust L. & Econ. Rev. 69 (1977).

widely. On another level, the rule has generated such controversy that there have been serious attempts at legislative reversal.[9]

The rule of *Illinois Brick* is in need of revision to remedy the controversy and confusion it has generated, to remove the unintended and undesirable rigidity which it has introduced, and to clarify the circumstances in which its application is justified. For these reasons, as well as those set out below, the petition for certiorari should be granted.

1. There Is Apparent Conflict Between The Rule Of *Illinois Brick* And Other Decisions Of This Court Which Has Generated Confusion Over The Proper Scope And Meaning Of The Rule.

For many years, the decisions of this court emphasized the breadth of the remedy afforded by the antitrust laws. In *Radovich* v. *National Football League*, 352 U.S. 445, 454 (1957), the Court noted the Congressional policy favoring enforcement of the antitrust laws through private actions. "In the face of such a policy," the Court concluded, "this court should not add requirements to burden the litigant beyond what is specifically set forth by Congress in those laws." This policy of private enforcement is coupled with one of vigorous enforcement. *See Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1967). And, in the context of suit by a primary producer, the Court has emphasized the breadth of protection afforded by the antitrust laws:

> "[Section 4] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . but is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

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[9] *See, e.g.*, S. 1874, 95th Cong., 2d Sess. (1978); H.R. 11942, 95th Cong., 2d Sess. (1978); S. 300, 96th Cong., 1st Sess. (1979).

In *Illinois Brick* this court restricted the scope of the remedy afforded by the antitrust laws by depriving ultimate consumers, who stand at the very end of the distribution chain, of the right to bring suit against persons in the chain with whom they have not dealt directly. In making this rule the Court was aware of the fact that the *Illinois Brick* plaintiffs had suffered only minimal damages.[10] The minimal damages meant that incentive to sue, or even to come forward and collect damages awarded, was lacking. See 431 U.S. at 747. In these circumstances the Court expressed its opinion that the effectiveness of the antitrust remedy would be enhanced by the elimination as antitrust plaintiffs of indirect purchasers "with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge." 431 U.S. at 745. And the Court accepted without difficulty that their holding had the result of "[denying] recovery to those indirect purchasers who may have been actually injured by antitrust violations," 431 U.S. at 746.

In the present case, in contrast, the entire livelihood of the Cross-petitioners is at stake. Damages amount to tens of thousands of dollars per plaintiff, and incentive to sue and collect is substantial. Cross-petitioners, although they have dealt only indirectly with the defendant supermarket chains, have a much larger stake in the litigation than the intermediaries who have dealt directly. In this case, rather than banning a vast and uncertainly defined class of indirect purchasers who have suffered minimal damages, the rule of *Illinois Brick* bans an easily defined class of primary producers who have suffered truly devastating damages.

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[10] In *Illinois Brick* the taxpayer plaintiffs upon whose behalf the suit was brought stood to recover damages amounting to, at most, a few dollars *per capita*. Similarly, in *Hanover Shoe* the potential plaintiffs to whom damages might have been passed on (a pass-on which defendants were not allowed to prove) were purchasers of shoes at the retail level, who had suffered only a few pennies in damages per purchase.

In this context, *Illinois Brick* is difficult to reconcile with those cases cited above which emphasized the breadth of the antitrust remedy, and with the legislative purpose of the Sherman and Clayton Acts.[11] In its *Illinois Brick* opinion the Court neither explicitly nor implicitly overruled the decisions which incorporate these policies and in fact partly ratified them by citation and by reference to "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws." 431 U.S. at 745. The Court also noted, in the *Illinois Brick* opinion itself, that "considerations of *stare decisis* weigh heavily in the area of statutory construction," and pointed out further that there is a "presumption of adherence to prior decisions." 431 U.S. at 737.

Differing judicial interpretations of the proper scope of the rule of *Illinois Brick* have produced an area of the law in which there is confusion and a clear need for guidance from this Court. The decision of the Fifth Circuit in the present case, which gives the rule of *Illinois Brick* a broad reading, applying it *mutatis mutandis* to a situation very different from that in which the rule was made, is at variance with those decisions which have held that *Illinois Brick* states a narrow rule which should not be expanded beyond the facts of the case.[12] *Illinois Brick* itself is a sharp departure from prior precedent, and difficult to reconcile with those cases which emphasize the

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[11] See *Illinois Brick*, 431 U.S. at 754-56 (Brennan, J., dissenting); *and see* S.Rep. No. 95-934, 95th Cong., 2d Sess. at 7 (1978).

[12] *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1, 18 (1st Cir. 1979) (*Illinois Brick* "involved a narrow question concerning the offensive use of the 'pass-on' rule . . ."); *Dart Drug Corp.* v. *Corning Glass Works, Inc.*, 480 F. Supp. 1091, 1101 (D.Md. 1979) (rationale of *Illinois Brick* makes it "abundantly clear" that suit is barred "only . . . where plaintiff's injury is premised on an 'overcharge' " and where proof of passing-on is required); *Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 477 F. Supp. 1150, 1158 (S.D.N.Y. 1979) (*Illinois Brick* presents a "narrow holding"); *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072, 1108 (N.D.Cal. 1979) (rationale of *Illinois Brick* will not be expanded to new situations).

breadth of the remedy of the antitrust laws. The petition for certiorari should be granted to clarify this confused area of the law, to provide the guidance necessary to produce consistent judicial interpretations of the scope of the rule and its relationship to prior precedent, and to safeguard the enforcement of the antitrust laws. See *Calhoon* v. *Harvey*, 379 U.S. 134, 137 (1964); *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. at 136.

2. Application Of The Rule Of *Illinois Brick* In Situations In Which Dismissal Of An Indirect Purchaser Plaintiff Will Create A Hiatus In Antitrust Enforcement Threatens The Vitality of Private Antitrust Enforcement.

The Fifth Circuit's opinion in this case, by denying to the cattlefeeders the opportunity to prosecute their price-fixing case against the supermarket chain defendants, creates a hiatus in enforcement of the antitrust laws which cannot be filled by any other plaintiff.[13] It allows a price-fixing conspiracy to insulate itself from liability by dealing with the victim through an intermediary, so long as it can ensure—by marketing arrangements or more subtle devices—that the intermediary has no incentive to sue. The petition for certiorari should be granted because the Fifth Circuit's decision "threaten[s] the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States."*Perma-Life Mufflers, Inc.* v. *International Parts Co.*, 392 U.S. at 135.

In order to bring suit for violation of the antitrust laws, a plaintiff must show two things.

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[13] It is not relevant here that the Fifth Circuit has allowed the present case to go forward under the "cost-plus exception." See 600 F.2d at 1166. Even if these plaintiffs can qualify under this exception (and the Fifth Circuit's opinion creates a stringent standard of proof which may severely limit the class of potential plaintiffs), the more general principle presented here—that *Illinois Brick* should not be extended to situations where it hinders rather than promotes effective enforcement of the antitrust laws—deserves to be vindicated.

First, he must show that he has standing under Section 4 of the Clayton Act. In the present case, the cattlefeeder plaintiffs undoubtedly have standing, for they have suffered devastating damages to their "business or property," and these damages are alleged to have resulted from the price-fixing conspiracy. *See Hawaii* v. *Standard Oil Co. of Calif.*, 405 U.S. 251, 264 (1972). In contrast, the packers and slaughterers who are intermediaries between the cattlefeeder plaintiffs and the supermarket chain defendants do not have standing to sue because they have not been damaged. The artificially depressed price or "undercharge" for carcass beef does not affect the packers, because they pay the cattlefeeders the price established by the supermarkets.[14] No portion of the "undercharge" is absorbed by the packers.[15] The packers, therefore, have not suffered the injury

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[14] See 600 F.2d at 1154 n. 5. The packers make their entire profit from the byproducts of the slaughtering process.

[15] It is not unexpected that an intermediary would pass an "undercharge" along the supply chain without absorbing it. An overcharge increases the price of the price-fixed good, and the normal consequence is that demand drops. This gives the intermediary an incentive to absorb as much as possible of the overcharge. It is this absorption of the overcharge which gives rise to the intermediaries' damages. When an undercharge is imposed the price is lowered and demand remains steady (or may even increase). In this situation, the intermediary has no incentive to absorb the undercharge, and hence escapes without damage. In fact, if volume of sales increases he may even profit from the undercharge.

The only situation in which an intermediary passing along an undercharge would have an incentive to absorb the undercharge would be if he were threatened with loss of supply. Supply may fall for two reasons, neither of which is operative here. First, supply to a particular intermediary will drop if the producer can go to another buyer who will pay a better market price. In the present case, where the entire market is affected by the price-fixing conspiracy, the producer cannot shift to a non-price-fixing intermediary. Second, supply will drop throughout the industry if the production process can respond quickly to lower prices by restricting supply, i.e., if supplies are "elastic." Here, as the court of appeals noted, the supply of fat

[*Footnote continued on next page.*]

to their business or property which is requisite to establish standing under § 4.[16]

Second, in order to maintain suit a plaintiff must show, under the rule of *Illinois Brick*, that he has dealt directly with the proposed defendant. The packer intermediaries can satisfy this requirement by showing that they have dealt directly with the defendant supermarket chains but the cattlefeeders cannot. The packers, therefore, can show an injury cognizable under *Illinois Brick*, but the cattlefeeders cannot.

The result is that in the present case the cattlefeeders have standing to bring suit but cannot overcome the bar of *Illinois Brick* (except to the extent that some may be able to fit within the cost-plus exception), while the packer intermediaries can satisfy the rule of *Illinois Brick* but cannot meet the test for standing. This gives rise to a hiatus in the enforcement of the antitrust laws which, if this case is allowed to stand, will persist in every case in which an intermediary lacks incentive to sue a price-fixer with whom he has dealt directly.

A number of lower courts have expressed their concern over situations in which application of the rule of *Illinois Brick*

[*Footnote continued from previous page.*]

cattle is highly inelastic in the short run. Cattle ready for slaughter must be slaughtered within a three-week period, and so cannot be withheld from the market. And, the "production process"—i.e., breeding and fattening—takes about 18 months, so in the longer run also, response to changes in price is inelastic. *See* 600 F.2d at 1165.

[16] If the packers are co-conspirators of the defendant supermarket chains (see *infra* at 14), they lack standing for an additional reason. A participant in a conspiracy normally may not maintain suit against a co-conspirator. *See Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134; *Premier Electric Construction Co.* v. *Miller Davis Company*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *Columbia Nitrogen Corp.* v. *Roster Co.*, 451 F.2d 3 (4th Cir. 1971); *General Beverage Sales Co., Oshkosh* v. *Eastside Winery*, 396 F. Supp. 590 (E.D.Wis. 1975).

will create a hiatus in antitrust enforcement.[17] The strong public policy in favor of private enforcement of the antitrust laws encourages such an interpretation, and in fact this Court, in the *Illinois Brick* opinion itself, stated that the holding of the case was intended to ensure continued vigorous enforcement of the antitrust laws. 431 U.S. at 745. In *Hanover Shoe* the Court expressly noted its concern with ensuring that a plaintiff be available to bring suit. 392 U.S. at 494.

This Court has recently expressed its distaste, in the antitrust context, for *per se* rules which introduce "an unintended and undesirable rigidity" into the law. *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977). To apply the rule of *Illinois Brick* in a situation in which the underlying rationale of the decision is not thereby vindicated[18] is to

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[17] *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 1980-2 Trade Cas. (CCH) ¶ 63,310 (9th Cir. 1980) ("barring . . . suit would close off every avenue for private enforcement . . . This would be intolerable"); *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13, 18 (3d Cir. 1978) ("to deny recovery in this instance would leave a gaping hole in the administration of the antitrust laws. It would allow the price-fixer of a basic commodity to escape the reach of a treble-damage penalty simply by incorporating the tainted element into another product . . ."); *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091, 1101 (D.Md. 1979) (an indirect purchaser should be allowed to sue where "plaintiff is the only person who can effectively present this claim. No one else has standing . . ."); *Florida Power Corp.* v. *Granlund*, 78 F.R.D. 441, 443-44 (M.D.Fla. 1978) (to deny the indirect purchaser the right to bring suit would, in a vertical conspiracy situation, immunize the price-fixer from suit. "The Supreme Court cannot have intended such a result . . ."); *Nationwide Mutual Insurance Co.* v. *Automotive Service Councils of Del., Inc.*, No. 78-323 (D.Del. May 20, 1980) (where the indirect plaintiff is "ready and willing to fill a potential gap in [antitrust] enforcement," this is "clearly in the public interest").

[18] None of the three premises of the *Illinois Brick* decision is satisfied here. Since the packers are not damaged, there is no problem of allocation of damages. Nor is multiple liability for the supermarket chain defendants a possibility because the packers lack standing to bring their own suit. Third, the policy of promoting effective enforcement is not enhanced by the hiatus in enforcement which is threatened here.

introduce into the law in the form of a prophylactic rule the very same "undesirable rigidity" which the Court attacked in its *Continental TV* decision. To prevent this result, the Court should grant the petition for certiorari, as it did in *Perma-Life Mufflers, Inc.* v. *International Parts Co.*, 392 U.S. 134 (1967), to promote continued effective private enforcement of the antitrust laws.

3. The Decision Below Concerning Application Of The Rule Of *Illinois Brick* In The Context Of A Vertical Conspiracy Conflicts With A Decision Of The Seventh Circuit And Decisions Of Several District Courts.[19]

This case squarely raises an important question concerning the interrelationship of the law of conspiracy and the antitrust laws. The aspect of the law of conspiracy which is relevant here is the rule concerning the liability of co-conspirators. Under the

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[19] The court of appeals held that the complaints in these actions "do not allege a conspiracy between the slaughterhouses and packers and the defendants". 600 F.2d at 1154. This holding is incompatible with the rule recently reiterated by this Court that complaints must be liberally construed in favor of the pleader, *see McLain* v. *Real Estate Board of New Orleans, Inc.*, ____ U.S. ____, 100 S. Ct. 502, 511 (1980), a policy which has particular force in an antitrust case, *see Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969). Allegations of conspiracy were sufficient under this rule. The conspiracy is implied in the *Lowe* complaint; additional facts (which the court could have—and should have—taken into account in these circumstances) were before the court. Had the *Lowe* complaint been "liberally construed in favor of the pleader" on this point, the court would surely have found that the existence of a conspiracy was adequately alleged. But had it found that the allegations were *not* adequate in this respect (and had it believed that this was a point of crucial importance) it should have respected the policy of Rule 15(a), Fed.R.Civ.P., and remanded the case with instructions to allow amendment. This is particularly appropriate when there has been a change in the law (all the implications of which were not immediately apparent) since the complaint was filed (*Blonder Tongue Labs* v. *University Foundation*, 402 U.S. 313, 349 (1971)), or where disposition of the case has caused a previously unimportant fact to assume crucial importance, *Commissioner* v. *Estate of Donnell*, 417 F.2d 106 (5th Cir. 1969).

common law of conspiracy,[20] all members of a conspiracy are jointly and severally liable.[21] A plaintiff dealing with any member of a defendant conspiracy deals with all members, and may recover in full from any member. It is not necessary to join all co-conspirators in a single action, and a defendant co-conspirator may not complain that co-conspirators not named as defendants are indispensable parties.[22] These principles are unaffected by the fact that a conspiracy in an antitrust case may bridge several levels of the supply chain; a vertical conspiracy falls squarely within the prohibition of the Sherman Act. *United States* v. *General Motors Corp.*, 121 F.2d 376, 404 (7th Cir. 1941).

When a vertical conspiracy exists which bridges between the links in a supply chain "market forces have been superseded," [23] the economic forces which make damages so difficult

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[20] An antitrust violation is itself at bottom a common law tort. *See Solomon* v. *Houston Corrugated Box Co.*, 526 F.2d 389, 392 n. 4 (5th Cir. 1976). The common law principles concerning liability for a participant in a tortious combination apply in full in antitrust cases.

[21] *Solomon* v. *Houston Corrugated Box Co.*, 526 F.2d at 392 n. 4; *Solomon* v. *U.S.*, 276 F.2d 669, 675 (6th Cir.), *cert. denied*, 364 U.S. 890 (1960); *Washington* v. *American Pipe & Construction Co.*, 280 F. Supp. 802, 804 (S.D.Cal. 1968). The question of whether a defendant co-conspirator who is found liable has a right of contribution from other co-conspirators, named or unnamed in the suit, is unsettled. *Westvaco Corp.* v. *Adams*, 590 F.2d 1011 (5th Cir. 1979), *cert. granted*, No. 79-972 (June 17, 1980).

[22] *American Motor Inns, Inc.* v. *Holiday Inns, Inc.* 521 F.2d 1230, 1244 n. 42 (3d Cir. 1975); *Hennessey* v. *National Collegiate Athletic Assn.*, 564 F.2d 1136, 1147 (5th Cir. 1977); *Tondas* v. *Amateur Hockey Assn. of U.S.* 438 F. Supp. 310, 315 (W.D.N.Y. 1977).

[23] See 431 U.S. at 736 n. 16. The example given there of circumstances in which "market forces have been superseded" is the situation of a customer who is controlled by his supplier. A similar example is given in *Hanover Shoe*—that of a pre-existing cost-plus contract. See 392 U.S. at 494. It is clear from the context that both of these instances are purely illustrative, and most courts have so interpreted them. *See, e.g., Midwest Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 577 n. 8 (3d Cir. 1979); *Royal Printing Co.* v. *Kimberly-Clark Corp.*, ____ F.2d ____, 1980-2 Trade Cas. (CCH) ¶63,210 (9th Cir. 1980).

to allocate are not at work, and the main premise of the *Illinois Brick* decision falls. Although this seems clear, the Fifth Circuit in this case, and several other courts as well, have struggled to reconcile the law of conspiracy with the rule of *Illinois Brick* and have come up with sharply differing solutions.[24] The issue is an important and recurring one: in the last four years, it has been raised in at least three circuit courts and at least eight district courts. There is a need for a uniform rule on this point; at least some of the district court decisions cited above, and others as yet unreported, are likely to reach the courts of appeal. In the courts of appeal, the differing interpretations of the scope and meaning of *Illinois Brick* in the vertical conspiracy situation have produced and will continue to produce differing judicial responses which will aggravate the confusion already evident in this area of the law. Certiorari should be

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[24] In the present litigation, the Fifth Circuit held that where intermediary co-conspirators are *not* named as defendants, suit may *not* be maintained against ultimate co-conspirators. This holding was followed in *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091, 1103 (D.Md. 1979). *See also Internat'l Ass'n of Machinists* v. *Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979) (dismissal granted where plaintiff alleged a vertical conspiracy between OPEC nations and domestic oil companies but failed to name the oil companies as defendants.). Two other district courts have held that where a plaintiff alleges that he has dealt with a vertical conspiracy, and joins *as defendants* both intermediary co-conspirators and ultimate co-conspirators, the plaintiff is not barred by *Illinois Brick* from maintaining suit against the ultimate conspirators. *Gas-A-Tron of Arizona, Inc.* v. *American Oil Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,789 (D.Ariz. 1977) (if complaint is amended to name intermediary co-conspirator as defendant, "no pass-on theory will be necessary to prove damages"); *Adams* v. *Interco, Inc.*, 1980-2 Trade Cases (CCH) ¶ 63,292 (S.D.N.Y. 1980) (where plaintiffs purchased

[*Footnote continued on next page.*]

granted to give the lower courts guidance on this important question, and to resolve the conflict between the Fifth and Seventh Circuits. *See Calhoon* v. *Harvey*, 379 U.S. 134, 137 (1964); *Massachusetts Trustees* v. *U.S.*, 377 U.S. 235, 237 (1964).

[*Footnote continued from previous page.*]

directly from named defendant intermediary co-conspirators "the *Illinois Brick* rationale is wholly inapplicable."). These holdings are compatible with the Fifth Circuit's approach.

One circuit court and three district courts have rendered decisions which are incompatible with the Fifth Circuit's decision in the present case. In *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1978), the Seventh Circuit held that where a plaintiff alleges he has dealt with a vertical conspiracy and has named the intermediary co-conspirator as a co-conspirator but *not* as a defendant, *Illinois Brick* will not preclude the plaintiff from recovering from the ultimate co-conspirator. 617 F.2d at 481. Three district courts have held that where a purchaser has dealt directly with *any member* of a defendant conspiracy he can sue that member or any other, and that in these circumstances the rule of *Illinois Brick* has no application. *Florida Power Corp.* v. *Granlund*, 78 FRD 441, 443 (M.D.Fla. 1978) (to deny right to maintain suit against manufacturer with whom plaintiff-intervenor had not dealt "would immunize from antitrust liability any manufacturer who conspired with his suppliers . . . The Court cannot believe the Supreme Court intended such a result without discussing it"); *Reiter* v. *Sonotone Corp.*, 486 F. Supp. 115, 119 n. 3 (D.Minn. 1980) ("The fact that a plaintiff chooses to sue a manufacturer rather than a retailer, when both are involved in an alleged conspiracy, is not relevant to the determination of whether the purchaser is an indirect or direct purchaser"); *Vermont* v. *Densmore Brick Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,347 (D.Vt. 1980) ("the restriction imposed by *Illinois Brick* only applies where a plaintiff suing to terminate a price-fixing conspiracy is removed *from the conspiracy* by one or more stages of distribution") (Emphasis added). *Reiter* is cited with approval in *Zenith Radio Corp.* v. *Matsushita Electrical Industrial Co.*, No. 74-2451 (E.D.Pa. May 5, 1980) (slip opinion).

The issue was raised but not reached in the Third Circuit in *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13, 20 (3d Cir. 1978).

CONCLUSION

For the foregoing reasons, the cross petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

List of All Parties to the Proceeding in the Fifth Circuit (see Rule 21(1)(b) of the Supreme Court Rules).

A. ***Plaintiffs***

1. Burke Petersen and Yvonne Petersen, individually and dba Eureka Ranch Company, and Petersen Cattle Company, No. CA 3-76-1254 (N.D.Tex. September 7, 1976).

2. Pony Creek Cattle Company, Inc., an Oklahoma Corporation; Lazy 8 Cattle Company, an Oklahoma Partnership; Coldwater Cattle Company, an Oklahoma Partnership; Hitch and Cantrell, an Oklahoma Partnership; Hitch-Atkinson Cattle Co., Inc., A Kansas Corporation; H. C. Hitch, Jr.; Henry C. Hitch Ranch, Inc., an Oklahoma Corporation; Hitch Custom Cattle Feeding Corporation, an Oklahoma Corporation; Paul H. Hitch; Willingham and Hitch, an Oklahoma Partnership; Kearny County Cattle Company, a Kansas Partnership; J. R. Ham; David Long Cattle Co., a Texas Corporation; Joe McGrew; Panhandle Cattle Feeders, Inc., an Oklahoma Corporation; Ralph Grounds; R.G. Grounds; Grounds-Sarchet, an Oklahoma Partnership; Grounds-Feil, an Oklahoma Partnership; Leo Winters dba S & S Cattle Company; Leo Winters dba WW Livestock Company; Vose & Son, an Oklahoma Partnership; Ravco Cattle Company, an Oklahoma Patnership; Glen Cantrell; Elmer Graham; Gene Stipe; C. O. Sage; Redd Feeding Company, a Utah Partnership; Redd Feeding Corporation, a Kansas Corporation; Western Trio Cattle Fund No. 1; Western Trio Cattle Fund No. 2, Western Trio Cattle Fund No. 3, Western Trio Cattle Fund No. 4, Western Trio Cattle Fund No. 5, Western Trio Cattle Fund No. 6, Western Trio Cattle Fund

No. 7, Western Trio Cattle Fund No. 8, Western Trio Cattle Fund No. 9, Western Trio Cattle Fund No. 10, Western Trio Cattle Fund No. 11, Western Trio Cattle Fund No. 14, Western Trio Cattle Fund No. 15, Western Trio Cattle Fund No. 16, Western Trio Cattle Fund No. 17, Western Trio Cattle Fund No. 18, Western Trio Cattle Fund No. 19, Western Trio Cattle Fund No. 21, Western Trio Cattle Fund No. 22; Western Trio Special Option Fund A; Western Trio B; Western Trio Special Option BN, Western Trio Special Option Fund C, Western Trio Special Option Fund D, Western Trio Special Option Fund F, Western Trio Special Option Fund H, Western Trio Special Option Fund K, Western Trio Special Option Fund M, Western Trio Special Option Fund N, Western Trio Special Option Fund O, Western Trio Special Option Fund P, Western Trio Special Option Fund PC, Western Trio Special Option Fund PC-2, Western Trio Special Option Fund V, Western Trio Special Option Fund VR, Western Trio Special Option Fund W, Western Trio Special Option Fund X, Western Trio Special Option Fund Y, Western Trio Special Option Fund Z; Lawrence E. Steinberg; PLS, Inc.; and Protein Builders, Inc. No. CA 3-75-0702-C (N.D. Tex. June 5, 1975).

3. Richard S. Lowe, David Lorch, Percy Zylstra, Robert P. Knips, Clarence Kremer, Otto Lorch, Elmer Peters, Harlan D. Peterson, Walter Ranshau, Anthony Strouth, John Strouth, William Strouth, Bernard Thier, Richard Thier, Carl Winter-Boer, Charley Zylstra, Robert C. Zylstra, Charley Zylstra & Sons, Inc. No. CA 3-76-1244-C (N.D.Tex. September 7, 1976).

4. Meat Price Investigators Association, an Iowa unincorporated association and trust, Lavern E. Reschke, Darrel Kleppe, Dean Jackson, Joe Mente,

Clarence Vos, Lynn Sheriff, Wayne Meier, Don Reilly, Bill Eno, Gay Hatle, Bob Severtson, Clem Schroeder, Floyd Edgington, Jr., Glenn Freie, Allan Bertram, and Byron Hayes, Individually and as Members of the Board of Trustees of Meat Price Investigators Association; Reschke Brothers, an Illinois partnership; Jackson Farms, an Iowa partnership; Idlewild Farms, an Iowa partnership; Eno Farms, Inc., an Iowa corporation; Edna Feedlot, a Kansas partnership; and Hayes Cattle, Inc., a Missouri corporation. No. CA 3-76-1238-C (N.D.Tex. September 7, 1976).

5. Shoshone Tribe of Duckwater, Andy Thompson, Wesley Allison, Boyd Graham and the Duckwater Stockmen's Association; Richard Adams; R. Dirk Agee and Marta Sanford Agee, his wife; John W. Anderson; Paul Andre; John Andrews; Sylvan Aronson; Abram Araje; John Ater; Avenales Cattle Company; Baker Ranches, Inc., a Nevada corporation; Harold U. Baker, Ballard Ranches, Inc., a Nevada corporation; Larry Bateman and John S. Suominen, dba Bateman & Suominen; Gabriel Berczi; Alan Berry and Norbert Nizzi, dba Berry & Nizzi; Peter Paris, Bertrand Paris, Sr., Bertrand Paris, Jr., dba Bertrand Paris & Sons; Joseph L. Black, James P. O'Sullivan and Robert H. Weight, dba Black, O'Sullivan & Weight; Brendan Boylan; Conrad L. Breitenstein and Leola Breitenstein, his wife; Floyd R. Brown; Eugene Buzzetti and Amanda Buzzetti, his wife; Claude T. Carline; John C. Carpenter and Roseann C. Carpenter, his wife; Dale B. Christensen; Murray Zwick, Robert H. Weight, Joseph L. Sanders, Richard A. Milson, and John U. Suominen, dba Circle Bar Cattle Company; Connecticut Capital Corporation, a California corporation; Corona Capital Corporation, a New York Corporation; Earl R. Crane; Joseph H. Daher; Franklin J. Dailey; D. Vernon Dalton and Joanne B.

Dalton, his wife; Willametta K. Day; Robert E. Dickenson and Dorothy M. Dickenson, his wife; Duval Ranching Company, a Nevada corporation; Carl Eckhardt, Grace E. Eckhardt, Stanley Z. Eckhardt and Carol Lynn Eckhardt, dba Eckhardt & Szarek Livestock; Carl Eckhardt; Ellison Ranching Company, a Nevada corporation; Joe B. Fallini, Jr., and Susan L. Fallini, his wife; Joe B. Fallini, Sr. and Helen Fallini, his wife; Jay Kingsley Fife; Luis J. Figueroa; Leo R. Foster; William Freschi, Jr.; William Freschi, Sr.; George Gardner, dba Gardner Ranches; Van C. Gardner and Margaret A. Gardner, his wife; Glaser Land and Livestock Company, a Nevada corporation; Gonder's Ranch, a co-partnership; Galal Gough; Dario Gonzales; Merle Guldager and Carmen Guldager, his wife; Halstead-Forsgren Ranches, Inc., a Nevada corporation; Carl J. Hanks; Norman G. Haws, Carolyn M. Haws, George H. Shiveley and Margaret A. Shiveley, dba Haws-Shively Cattle Company; Dee W. Heckethorn, formerly Heckethorn Ranches, Inc.; Manuel Hidalgo; Holstein Beef Improvement Co-Op, a California corporation; Holstein Beef Improvement Co-Op II, a California corporation; Donald Huntsman; Joe Sustacha, Jr., Lucille Sustacha, James Sustacha and John Sustacha, dba Joe Sustacha & Sons, a Nevada partnership; Gracian Uhalde and Gracian Uhalde, Jr., dba John Uhalde & Company; Helene Kaker; Charles Kennan, Jr.; Soo Kim; J. Dee Lancing; Laucirica Livestock Company, a Nevada corporation; R. Charles LeClerc; Lee Wilson & Company, a Delaware corporation; Jack Lewis; William Lewis; Norman Lindley and Sandra Lindley, dba Lindley Ranch Company; Henry B. Lowsma, individually and dba Norwood Cattle Feeding Pool and Janedan Cattle Feeding Pool; Carey Maddell; John Manzonie, Gaylin Manzonie, Dell Manzonie, dba

Manzonie Ranch; Byron Marshall; John W. Marvel and Wilburta S. Marvel, his wife; John L. Mattice and Kathleen Mattice, his wife; Charles Mauro; James Meeks; Seymour Melnick; Raymond Y. Mendive and Toni Linda M. Mendive, his wife; Douglas C. Mitchell and Barbara Mitchell, his wife; John Moore; Nello Mori and Ida Mae Mori, his wife; M. Conway Morris; Mt. Moriah Ranches, Inc., a Nevada corporation; Paul J. Narcowich; H. L. Newbold; Joseph Oddo; Adrian Ortega; James E. O'Sullivan and Robert H. Weight, dba O'Sullivan & Weight; Bertrand Paris, Jr., Pierre V. Paris and Paul Inchauspe, dba Paris, Paris & Inchauspe, a Nevada partnership; George Parman and Jewelle C. Parman, Pete Pescio, John Pescio, Tom Pescio and Joe Pescio, dba Pescio Bros. Ranches, a partnership; Pine Forest Land & Stock Company; Robert E. Probert; John A. Radcliffe; Michael E. Ramos; Doug Reed; Dietrich Reisch; Donald Rizzi and Norma Rizzi, his wife; Robert R. Wright Company, a Nevada corporation; Marcel Roman; Lynn Rose and Elaine Rose, his wife; Theodore Rutherford; John P. Ryan; Silas Jack Sinton and Richard Rudnick, dba S & R Cattle Company, a Nevada partnership; Salicchi Ranches, Inc., a Nevada corporation; Floyd Sanders; Robert Schumman; Nelson T. Scott; Earl F. Sharp and Barbara A. Sharp, his wife; LeRoy Sharp, Murray P. Shevick and Lawrence Braslow, dba Shevick & Braslow; Silas Jack Sinton and Laurie Sinton, dba Sinton Feed Lot; James B. Sinton and Norma M. Sinton, his wife; Silas D. Sinton and Phyllis J. Sinton, his wife; William H. Smith; Silas D. Sinton and Silas J. Sinton, dba Spring Ranch, a partnership; Dandridge Sproul; Stanley C. Ellison Corporation, a Nevada corporation; Steptoe Ranch Company, a corporation; Joe Sustacha; Fernando A. Tellez; Phillip Terman; Devon Terry; Ralph J. Thompson; Tom Marvel Ranches, Inc., a Nevada corporation; Edward Tomera

and Yole Tomera, his wife; Frank Tybus; U X Livestock Company, a Nevada corporation; Herbert H. Uhlig, Iona Uhlig and Ernest H. Uhlig, dba Uhlig Ranches; Mike Vasquez and J. Ronald Thompson, dba Vasquez-Thompson Cattle Company; Luis Carlos Villa; Russell S. Weeks; George Weise; Vernon H. Westwood and Joan Westwood, his wife; Archie F. Corbari, Jr., dba Wild Horse Ranch; Calvin S. Wines and Margaret M. Wines, his wife; Carroll Wines and Gwen Wines, his wife; Leonard N. Wines and Ruth Wines, his wife; James Wright and Joann Wright, his wife; Donald E. Zerwekh; Robert M. Zweig; Frank Arregui and Elena Arregui, his wife; Walter E. Baumann and Ernest O. Baumann, dba Baumann Ranches, a Nevada partnership; Walter F. Baumann and James Baumann, dba Baumann Ranches, a Nevada Partnership; Mable I. Bieroth; Rulon E. Christensen; John V. Damele and Roberta Damele, his wife; Leo J. Damele and Ellen M. Damele, his wife; Charles B. Evans, Jr., Peggy D. Evans, John W. Krenka and Wanda L. Krenka, dba Circle Bar Ranches, a Nevada partnership; Thomas Gallagher, Dorothy Gallagher, Charles Damele, R. D. Damele and G. W. Garrett, dba Diamond Land and Cattle, a Nevada Partnership; Thomas Gallagher, Dorothy Gallagher and G. W. Garrett, dba Diamond Land and Cattle, a Nevada partnership; Louis Dressi and Kevin Dressi, dba Dressi Ranching Company, a partnership; LeRoy Etchegaray and Mary Jean Etchegaray, his wife; Charles B. Evans, Jr. and Peggy D. Evans, his wife; Michael H. Gallagher and Clark Wilde, a partnership; Thomas Gallagher and Dorothy Gallagher, his wife; Melvin R. Jones and Rachele Jones, his wife; Julian Tomera Ranches, Inc., a Nevada corporation; John W. Krenka and Wanda L. Krenka, his wife; William W. Lear, Louise Lear, Kay S. Lear and William K. Lear, dba Lear Ranches, a Nevada partnership; Leo Damele & Sons Ranches,

Inc., a Nevada corporation; Thomas Gallagher, Dorothy Gallagher, J. Harvey Sewell and Molly S. Sewell, dba Liberty Livestock; Harry Lund, Leora Lund, Dean Stitzel and Rita Stitzel, dba Lund and Stitzel, a Nevada partnership; Linda S. Wright, William B. Wright, Jr., and John P. Wright, dba Mary's River Ranch, a co-partnership; James L. McCormick, Jr. and Daniel M. McCormick, dba McCormick Brothers, a partnership; Clara McDermott; Peter L. Mori; James B. Morse and Estella Morse, his wife; Florence G. Peavey, individually, and as Executrix of the Estate of W. R. Peavey and Carl O. Peavey, dba Peavey Cattle Company; W. R. Peavey, Florence G. Peavey, Carl O. Peavey and Martha F. Peavey, dba Peavey Cattle Company, a Nevada partnership; Florence G. Peavey, individually, and as Executrix of the Estate of W. R. Peavey and Martha F. Sims, dba Peavey & Sims Cattle Company, a Nevada partnership; Peter L. Damele, LoRaine Damele and Bernard C. Damele, dba Peter Damele and Son, a Nevada partnership; Joe Pieretti; Joe Pieretti, as Trustee of the Trust of Maria Pieretti, deceased; Frank Prunty and Marge Prunty, his wife; Rand & Son, Inc.; Reed B. Robison; R. D. Reynolds and Barbara Reynolds, his wife; Thomas Gallagher and Dorothy Gallagher, dba 765 Cattle Company; James M. Smiley and Edward H. Smiley, dba Smiley Ranch, a Nevada partnership; Norman L. Thompson and Ellen Thompson, his wife; Battista Tomera, Jr.; George Tomera and Battista Tomera, Jr., as Executors of the Estate of Balsamina Tomera, dba Tomera Ranching, a Nevada partnership; John Tomera and Annie Tomera, his wife; J.R.C. Corporation, a Utah Corporation, dba Trans-World Enterprises, dba Lava Ridge Ranches, dba Lava Ridge Trucking; William Stock Farmining Company, a Nevada corporation; Frank Winchell and Bessie Winchell, his wife; Frank G. Baker and Ted

Baker, dba Baker Bros., a Nevada partnership; Barnes Ranches, Inc., a Nevada corporation; Duilio Bottari and Ella May Bottari, his wife; Andrew M. Boyd and Jack Boyd, dba Boyd Ranch, a Nevada partnership; George W. Brown and Rita I. Brown, his wife; Byington Steel Treating, Inc., dba Byington Ranch, a corporation; John W. Clay; Freda F. Munson and John D. Secrist, dba Dinner Station Ranch, a partnership; A. Greer Edwards; Jess Goicoechea, Elias Goicoechea, individually, and as Executors of the Estate of Fernando Goicoechea, dba Fernando Goicoechea & Sons, a Nevada partnership; George T. Flinders, Elizabeth L. Flinders and Thomas E. Flinders, dba Flinders Ranch, a Nevada partnership; William H. Gibbs, Frank W. Hooper and Phyllis Hopper, his wife; S. K. Howard, Janece Howard, Neil Howard and Gerri Lynn Withers, dba Howard Ranches, a Nevada partnership; Howard Ranches, Inc., a Nevada corporation; Richard W. McKay and Anna McKay, his wife; Willis Packer, Lois Packer, Dean Rhoads and Sharon Rhoads; Reata Cattle Company, a partnership; John J. Reed, individually and as Trustee of the Trust of Velma Reed, his wife, deceased; Robert G. Ojemann and A. Greer Edwards, dba Saval Ranching Company, a Nevada partnership; Tony Sestanovich and Lorraine Sestanovich, his wife; Von L. Sorensen and Marian Sorensen, his wife; Jess Sustacha and Merilyn Sustacha, his wife; Jack C. Taylor; Taylors, Ltd., a limited partnership; Marshall Morgan, dba U3 Ranch; Van Norman Ranches, Inc., a Nevada corporation; V & C Cattle Company, a Nevada corporation; W. H. Gibbs Company, a Nevada corporation; Farnes G. Egbert and Delores Egbert, his wife; Vernon Hawkes and Frederick Bellgardt, dba Hawkes & Bellgardt Mary's River Ranch; Marjorie Holbrook, individually, and as Executrix of the Estate of Burt Holbrook, deceased; Clair

H. Knudsen and Kathleen Knudsen, his wife; Andrew Knudsen and Janet Knudsen, dba Knudsen Ranch; Neff Ranch Company, a Nevada corporation; George Nixon and LaRue Nixon, his wife; Blaine Sharp and Gertrude Sharp, his wife; Max Spratling and Joyce Spratling, his wife; Stephen G. Wright and Mavis Wright, his wife; Dahl, Inc., a Nevada corporation; Paul Sansinena and Teresa Sansinena, his wife. No. CA 3-76-1237-C (N.D.Tex. September 7, 1976).

6. A. L. Black, Mrs. Lila M. Buske, Surviving Wife of G. B. Buske, As Independent Executrix and Trustee Under The Last Will and Testament of G. B. Buske, Deceased, Dated December 12, 1973, and of the Estate of G. B. Buske, Deceased; Pioneer Cattle Order Buyers, Inc., A Texas Corporation; Hereford Feed Yards, Inc., A Texas Corporation; Solana Corpooation, A Texas Corporation; Prochemco Cattle Company, Inc., A Texas Corporation; and, Eureka Cattle Company, Inc., A Texas Corporation. No. CA 3-76-1248-C (N.D.Tex. September 7, 1976).

7. Chaparral Cattle Corp., an Arizona corporation; Chaparral Cattle Corp., et al., dba NB Cattle Company, a Partnership; Thomas C. Noonan, Jr.; T. Clifford Noonan, Sr.; George Hanzi; Stephen H. Scott; Charles M. Scott; Donald N. Reeves; Dale Haroldsen; John S. Gleason; John S. Gleason, Mary Jane Gleason and Josey Corporation, a Nevada corporation; dba Toiyabe Cattle Company, a Partnership; Noonan Associates, a Nevada corporation; and Association de Sociebades Locales de Credito Ganadero Lizenciado Luis Escheverria Alvares de R.I., an unincorporated Mexican association. No. CA 3-76-1253-C (N.D.Tex. September 7, 1976).

8. Ronald Becker, Eugene Vander Hamm, Frances Stecher, Dean Stecher, and James R. Glann, on behalf

of themselves and all other persons similarly situated. No. CA 3-76-1361 (N.D.Tex. September 7. 1976).

9. John O. Varian and Zera L. Varian, his wife. No. CA 3-76-1470-C (N.D. Tex November 8, 1976).

10. Little Ranch Co., Inc., a Wyoming corporation; Fred A. Wolken, Sr.; Barton L. Parsons; Howard Schmele; Oak Creek Ranch Company, a partnership; Rudy Jafkela; Sloan Brothers; Erk Brothers, a partnership; Donald McPhersen; Malcom Cooper; Donald Halbmaier, a partnership; Arden Palmer; Linn Brothers, a partnership; Burdine & Sons, Inc., a South Dakota corporation; Nolan Sexton; Russel Earsley; Clifford Solseth; Squaw Butte Ranch, Inc., a South Dakota Corporation; Bernie Stevens; Elvin Mitchell; George Levin & Sons, Inc., a South Dakota corporation; Haley Ranches, a partnership; George L. Wurnig; Albert Wurnig; Edward F. Humble; Lewis Ribordy; Dale Simon; Johnson Brothers, a partnership; Stanley & Clarise Price; Roy Hulm; John B. Anderson; Bill Stone; Wayne Vig; Moe Dairy, Inc., a South Dakota corporation; Alvin Falzerano; Clark Arends; Eugene Welter; Wolff Cattle Co., a South Dakota corporation; Harlan Palo; Preston L. Hill; Donald E. Breidenbach; Loren Harper; Sixty-Nine Ranch; Harley J. Roth; Virgil Simons; Charles F. Sundstrom; Larry E. Gabriel; Wesley Wilfey; Kenneth Vig; Kenneth E. Budmayr; Clyde L. Hawkinson; Delfino Brothers, a California corporation, dba Imperial Cattle Company; Ed Oneto; Albertson Ranch Company, a Colorado partnership; Thompson Land & Cattle Co., Inc., a Colorado corporation; Harold J. Powers; and Kenneth Clark, individually and representatives of a class. No. CA 3-77-0362-C (N.D.Tex. March 16, 1977).

B. ***Defendants***

This list of defendants reproduces the list submitted by the defendants in the Fifth Circuit, pursuant to Local Rule 13(a) of that Circuit, which, like Rule 21(1)(b), requires a list of all parties. Where applicable, defendants have provided an identification of the parent corporation of a particular party. Subsidiaries of the parties have not been provided.

1. Albertson's Inc.
2. Allied Supermarkets, Inc.
3 American Stores Company
4. Arden-Mayfair, Inc.
5. Borman's, Inc.
6. The Circle K Corporation
7. Colonial Stores, Incorporated
8. First National Supermarkets, Inc.
9. Food Fair Stores, Inc. (a subsidiary of Hasam Realty Corp.)
10. Giant Food, Inc.
11. The Grand Union Company (a subsidiary of Cavendam (USA) Inc., which is a subsidiary of Cavendam Holdings, Inc., which is a subsidiary of Cavendam (Overseas) Limited, which is a subsidiary of Cavendam Limited, which is a subsidiary of Generale Occidentale Limited, which is a subsidiary of Generale Occidentale S.A.)
12. The Great Atlantic & Pacific Tea Company, Inc.
13. Jewel Companies, Inc.
14. The Kroger Co.

15. Lucky Stores, Inc.
16. The National Association of Food Chains
17. The National Provisioner, Inc.
18. National Tea Company (a subsidiary of Loblaw Companies, Ltd.)
19. Pueblo International, Inc.
20. Ralphs Grocery Company (a division of Federated Department Stores, Inc.)
21. Safeway Stores, Inc.
22. Skaggs Companies, Inc.
23. The Stop & Shop Companies, Inc.
24. Supermarkets General Corporation
25. Super Valu Stores, Inc.
26. Thriftimart, Inc.
27. Vons Grocery Co. (a subsidiary of City Products Corp., which is a subsidiary of Household Finance Corporation)
28. Winn-Dixie Stores, Inc.

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